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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Implementation of the Subscriber Carrier)
Selection Changes Provisions of the)
Telecommunications Act of 1996)
)
Policies and Rules Concerning)
Unauthorized Changes of Consumers')
Long Distance Carriers)

CC Docket No. 94-129

COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION

Its Attorneys

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

Todd Colquitt, Director
Legal & Regulatory Affairs

U.S. Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005
(202) 326-7249

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SUMMARY

The Commission should apply the verifications rules it adopts in this proceeding equally to all telecommunications carriers. There can be no justification for singling out incumbent local exchange carriers ("ILECs") for separate treatment when other carriers have incentives and opportunities to behave anti-competitively in their own established markets and as they enter new markets. The verification rules adopted by the Commission will work best in tandem with stiff penalties for unauthorized preferred carrier ("PC") switches. The Commission should focus its efforts on out-bound verification and afford consumers the maximum amount of control over their PC selections.

LECs must not be put in situations where they have to act as third party billing arbitrators. Where this cannot be avoided, LECs must be able to recover the costs they incur in assisting authorized carriers and slammers resolve disputes. Consumers who are victims of slamming should still be required to make remittance for services rendered, but should not be required to pay more than they would have but for the unauthorized PC change. Authorized carriers must be made whole by the slamming carrier.

Finally, the Commission should ensure that its rules do not inadvertently permit resellers to damage, unintentionally or otherwise, the service reputations of underlying network providers. Resellers that brand their service based on the underlying network provider cause themselves to be inextricably linked with the network provider in the mind of the customer. Any service reliability problems a customer may experience with a reseller that has switched its underlying provider without notifying the customer will reflect negatively back upon the original network provider despite the fact that its network is no longer associated with the customer.

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**COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association ("USTA") respectfully submits these comments in response to the Further Notice of Proposed Rulemaking issued in the above-referenced docket.¹ USTA is the principal trade association of the local exchange carrier ("LEC") industry, with over 1,000 members.

USTA applauds the Commission for initiating this proceeding to address the rapidly burgeoning problem of unauthorized carrier changes, or "slamming." By its own account, the Commission receives more complaints about slamming than any other telephone related

¹ Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, In the Matter of Implementation of the Subscriber carrier Selection Changes provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, FCC 97-248, released July 15, 1997 ("Further Notice").

complaint.² The skyrocketing annual growth rate of slamming incidents will only worsen as competition in the local and intraLATA toll markets increases. Slamming makes a mockery of consumer choice in the marketplace and forces consumers to waste time and money resolving issues they should never have had to deal with in the first place. From the service provider standpoint, the unscrupulous behavior of slammers is rapidly eroding the trust and goodwill carriers have built up with consumers over decades in responding to their needs in a positive manner. Slamming is a corrosive business practice that must be eliminated, and USTA welcomes this rulemaking.

I. Application Of Verification Rules

A. The Commission Should Apply Verification Rules Equally To All Telecommunications Carriers.

The anti-slamming provisions of Section 258 apply to all telecommunications carriers.³ The Commission should implement these provisions so that they apply *equally* to all telecommunications carriers. The Commission should not attempt to read something into the statutory language that does not exist. Specifically, the Commission asks commenters to “address whether incumbent LECs should be subject to different requirements and prohibitions because of any advantages that their incumbency gives them compared to carriers that are seeking to enter

² See, Testimony of Commissioner Susan Ness Before the Subcommittee on Communications, Senate Committee on Commerce, Science, and Transportation, delivered August 12, 1997 (Ness Testimony).

³ 47 U.S.C. § 258.

the local exchange markets.”⁴ The Commission does not base its supposition on any statutory language or legislative history.

Incumbent LECs (“ILECs”) and competitive LECs (“CLECs”) compete against one another in the local exchange market by offering different dial tone services designed to attract and retain customers. In that respect, they are largely differentiated from one another by branding. That ILECs have an initially larger local market share than CLECs has no bearing on the anti-competitive incentives and opportunities that might exist for CLECs to protect and expand their respective market shares. The focus of this proceeding should be to deter slamming by penalizing slammers. The Commission’s anti-competitive concerns can easily be addressed by more general rules that apply to all telecommunications carriers without singling out ILECs for separate treatment, provided such rules are properly implemented.

Moreover, the Commission does not explain why it believes that only ILECs would act anti-competitively, while CLECs apparently would not have anti-competitive incentives and opportunities to protect their own market share.⁵ For example, the Commission does not demonstrate why it believes that only ILECs would use preferred carrier (“PC”) freezes anti-competitively, while CLECs would not do so. Nor does it explain why only ILECs would make unauthorized PC switches, while CLECs would not.

In a similar vein, limiting PC changes submitted by ILECs only to those verified by third

⁴ Further Notice at ¶15 (footnote omitted).

⁵ Id. at ¶15, footnote 49.

parties unfairly discriminates against ILECs.⁶ The problem with slamming is not that it is overly difficult to detect. Indeed, the sheer volume of slamming complaints is indicative of the ease with which slamming is detected. Rather, the problem with slamming is that the Commission's rules do not deter slamming in the first instance. If the Commission adopts rules that eliminate the economic incentive for telecommunications carriers to slam, the Commission's purely speculative concerns that ILECs will "make unauthorized PC changes on their own behalf without detection," become moot.⁷ Adopting rules that eliminate the economic incentive for making unauthorized PC changes, yet nevertheless require ILECs alone to obtain third party verification would place ILECs at a competitive disadvantage. Third party verification should either be volitional or it should be required for all telecommunications carriers, not just ILECs.

B. The Commission Should Focus On Out-Bound PC Switch Call Verification.

If a customer calls a carrier and orders a PC change, common sense dictates that the customer is fully aware of the consequences of his actions. Requiring application of the Commission's verification rules to a customer who affirmatively acts on his own motion to switch carriers seems excessive.⁸ In-bound calls differ markedly from out-bound calls in that the consumer has already given thought to the matter of switching carriers and decided that doing so

⁶ Further Notice at ¶15.

⁷ Id.

⁸ Id., at ¶19.

is in his best interest. In-bound PC switch calls are ones of volition where the consumer has already made up his mind, whereas out-bound PC switch calls are ones in which the consumer must be persuaded.

Applying verification procedures to in-bound PC switch calls patronizes the consumer, questioning whether he really knows what in his best interests, thereby eroding his control over his choice of service providers. The Commission has expressed its concern that consumers will be reluctant to be pro-active in order to make changes in their carrier selections.⁹ One can hazard a guess as to how consumers will react when they are required to repeat pro-active requests to switch carriers made on their own initiative. Though well-intentioned, the Commission should affirmatively recognize consumer control over choice of telecommunications carrier and focus on verifying out-bound PC switch calls, which have a much higher potential and incidence of unscrupulous behavior.

C. The Commission's Current Verification Rules For Out-Bound PC Switch Calls Will Function Best In Tandem With Stiff Penalties For Unauthorized PC Switches.

Carriers should be permitted to continue applying the range of verification procedures available to them. Continuing this flexibility will allow carriers to adjust to different markets accordingly. For example, in states where slamming is a more prevalent problem, like California, a carrier may wish to choose third party verification as its verification procedure. In a different state where slamming is less prevalent, third party verification may be excessively cautious.

⁹ Id., at ¶22.

Carriers should have the ability to make their own decisions about which verification procedure offers them the greatest amount of assurance while still being cost-effective. That the Commission's current verification rules have failed to eliminate slamming has more to do with their bark lacking bite than it does about any shortcomings in the rules. The problem with slamming is that the penalty for violating these rules is not sufficient to offset the financial benefit of doing so.

Accordingly, the Commission should back up these verification procedures with penalties whose costs outweigh any benefits a slammer might perceive in making an unauthorized PC change. The Commission has a wide range of options before it for punishing slammers and it should employ them. Substantial fines, forfeitures, consent decrees, and perhaps even FCC service license revocation in extreme cases, should be vigorously employed against those carriers that choose to ignore proper verification procedures. Already, intraLATA toll slamming is becoming a problem.¹⁰ With competitive entry into the local exchange continuing to accelerate, the problem of slamming will only continue to grow until the Commission eliminates the financial incentive. Moreover, as competition increases, ILECs will no longer be neutral third parties. Not only will slamming complaints increase dramatically, but resolving slamming complaints will become more contentious absent Commission action.

¹⁰ See, Ness Testimony.

D. Consumers Must Be Given The Option For Maximizing Their Control Over PC Selections.

As the Commission correctly notes, the consumer anger caused by slamming results from “the loss of control over their telecommunications carrier.”¹¹ The Commission should extend to consumers the option of maximizing their control by permitting them to choose which carrier selections to freeze. Consumers should have the ability to place individual freezes on their interexchange, intraLATA toll, and local services. Moreover, these individual PC freezes should remain in place regardless of whether the consumer makes PC changes in a different service. For example, if a consumer had three different PCs -- one for each type of service -- and then elected to switch the PC providing intraLATA toll service, the freezes for local and interexchange service would remain in place. As for the newly switched intraLATA toll service provider, the consumer would have to initiate the appropriate steps for enacting a new freeze on that service if the consumer so desired. PC freezes should be initiated and terminated only at the behest of the customer. Once a consumer terminates a PC freeze and switches to a new service provider, the consumer ceases to be a customer of that service, thereby causing the natural expiration of the freeze. The freeze does not follow the consumer.

USTA agrees that PC freezes do have the ability to hinder competition if the Commission’s rules permit improper use of them. USTA believes that customers must be fully informed about what a PC freeze does and what action is necessary on their part to change carriers once a PC freeze is placed. For those carriers which choose to use a mailing insert to

¹¹ Further Notice at ¶8.

inform their customers about PC freezes, USTA agrees that an insert similar to that which the Commission describes in the Further Notice would inform customers without pressuring them to enact a freeze or choose a particular PC.¹²

USTA suspects that the Commission may be correct in its supposition that "PC freezes may increase the burden of competing carriers in securing new customers."¹³ It may very well be that some consumers may be unwilling to take the additional affirmative step of lifting the freeze in order to complete the PC switch. The question becomes whether it is consumers or telecommunications carriers or the government that possesses the savvy to determine what is in the consumer's own best interests with respect to subscribing to telecommunications service. Given the magnitude of consumer anger over slamming, it would appear that consumers are determined to let slammers know that they know best.

USTA would also note that this burden would apply to all carriers. BOC interLATA affiliates will face the same burden garnering new interexchange customers when they are eventually authorized to begin offering service. A burden on all telecommunications carriers discriminates against none. The Commission should keep in mind that any resulting burden would be just as applicable in all three telephony markets, not just that of the local exchange, as some

¹² Id., at ¶23. ("We tentatively conclude that a carrier that mails to a subscriber (a) an explanation of a PC freeze, (b) an explanation of the subscriber's right to request such a freeze for its telecommunications service, and (c) advice on how the subscriber can obtain a PC freeze, would be acting consistent with the goals and policies of the Act and the Commission's rules and orders.") (See, too, omitted footnote 72 in ¶23.)

¹³ Id., at ¶22.

parties will no doubt allege. PC freezes may be an inconvenience for any and all carriers seeking to attract new customers, but it should be the consumer who is ultimately responsible for making the decisions affecting his welfare.

II. Liability Issues.

A. LECs Must Not Be Put In The Position Of Having To Act As Third Party Billing Arbitrators In Slamming Incidents.

The Commission should not adopt any rule that places an otherwise neutral third party between the authorized carrier and the slammer. Forcing neutral third parties into such situations requires the neutral party to expend time and resources resolving a dispute in which it has no stake. Unless a LEC is directly involved in a slamming incident, LECs should not be required to act as billing arbitrators between authorized carriers and slammers.¹⁴

With the present situation, every time a slamming incident occurs between two non-LECs, it is invariably the LEC that is required to expend time and resources in tracking down the billing specifics for a consumer using a service not provided to the consumer by the LEC itself, but by one of the two disputing non-LECs. When a consumer gets slammed, the LEC is forced to call the authorized carrier, review billing records, and undertake other tasks necessary to help the authorized carrier and the slammer resolve the incident.¹⁵ There is no specific mechanism that

¹⁴ USTA believes that CLECs, too, should not be forced to act as third party billing arbitrators.

¹⁵ It goes without saying that the LEC is also forced to bear the brunt of the consumer's understandable, but misplaced, anger over being slammed.

permits recovery of these costs. These are costs over and above those associated with standard PC changes and recovered through NECA's five dollar primary interexchange carrier change tariff. To the extent that LECs cannot avoid being interposed between authorized carriers and slammers, LECs must be allowed to recover these costs through a similarly standardized and predictable mechanism.

B. Consumers Should Be Required To Make Remittance For Services Rendered.

Although the notion of allowing customers the option of refusing to pay charges assessed by an unauthorized carrier has a certain innate appeal, this appeal disregards the fact that the consumer did in fact receive telecommunications service. It would be one thing if the consumer had been charged for services not rendered. However, the fact that the consumer did receive service, albeit not from their chosen carrier, requires remittance. The question is not whether the consumer should pay, but whom should the customer pay and how much? The answer to the first part of the question is two-pronged. If the consumer has already paid the slammer, then the authorized carrier should recover that revenue directly from the slammer. If the consumer has not paid the slammer, then the consumer should pay the authorized carrier after being re-billed by that carrier. The matter of how much the customer should remit ought to be determined by the authorized carrier. However, consumers should pay no more than they would have been charged had they not been slammed.¹⁶

¹⁶ With respect to the issue of whether slammers are required to remit the value of premiums the consumer would have earned but for the slamming, the legislative history of Section 258

C. Authorized Carriers Must Be Made Whole By The Slammer.

With respect to those charges for which the slammer should be liable to the authorized carrier, USTA agrees with the Commission's proposal that the slammer should, at a minimum, "be liable to the subscriber's properly authorized carrier in an amount equal to all charges paid by such subscriber after such violation."¹⁷ USTA would note that where the slammer's rates are higher than those of the authorized carrier, the rate differential would help offset expenses incurred by the authorized carrier in collecting the liability. Where the slammer charges a rate lower than that of the authorized the carrier, then the authorized carrier should be made whole by recovering the difference directly from the slammer. Ironically, in this instance, the consumer will benefit, albeit temporarily, from the actions of the slammer.

III. The Commission's Rules Must Protect The Service Reputation Of Underlying Network Providers From Harms Caused By Reseller Actions.

As USTA has already alluded, dial tone is increasingly becoming a commodity where customer service and product branding serve to delineate service providers.¹⁸ As such, service reputation will become paramount for attracting and retaining customers. Therefore, protecting

clearly indicates that "carriers guilty of slamming should be held liable for premiums, including travel bonuses, that would otherwise have been earned..." S. Conf. Rep. No. 104-458, 104th Cong., 2nd Sess. at 136 (1996) (Joint Explanatory Statement). USTA would simply state again that the issue of how these premiums are to be collected is a matter that should be strictly between the authorized carrier and the slammer.

¹⁷ Further Notice at ¶28 (footnote omitted).

¹⁸ See supra at p. 3.

that service reputation will be crucial. Toward that end, USTA agrees that any test adopted by the Commission for making determinations whether subscriber notification is required when a reseller changes its underlying network provider should, at a minimum, be based on factors of relevancy identified by the Commission in this Further Notice.¹⁹

If a reseller bases part of its branding strategy on the implied reliability of the underlying network provider, then that underlying network provider is inextricably linked in the mind of the consumer with the reseller. If a reseller changes network providers without notifying the consumer of the change, the original network provider will suffer negative fallout from any future service reliability problems the consumer might experience even though it is no longer the underlying provider. The Commission should ensure that its rules do not inadvertently permit resellers to damage, unintentionally or otherwise, the service reputations of underlying network providers.

CONCLUSION

For the above-stated reasons, the Commission should apply the verification rules it adopts in this proceeding equally to all telecommunications carriers. These verification rules will work best in tandem with stiff penalties for unauthorized PC switches. The Commission should focus its efforts on out-bound verification and give consumers the maximum amount of control over their PC selections.

¹⁹ Further Notice at ¶39.

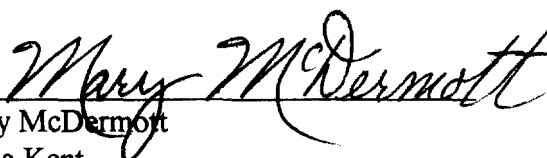
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Finally, the Commission should ensure that its rules do not inadvertently permit resellers to damage, unintentionally or otherwise, the service reputations of underlying network providers.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

Its Attorneys

BY 
Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

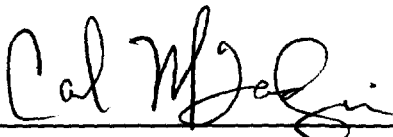
Todd Colquitt, Director
Legal & Regulatory Affairs

U.S. Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005
(202) 326-7249

September 15, 1997

CERTIFICATE OF SERVICE

I, Carl McFadgion, do certify that on September 15, 1997 copies of the Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the person on the attached service list.



Carl McFadgion

Regina Keeney
Federal Communications Commission
1919 M Street, NW
Room 500
Washington, DC 20554

Mark C. Rosenblum
Robert J. McKee
AT&T
295 North Maple Avenue
Room 3244J1
Basking Ridge, NJ 07920

Peter H. Jacoby
Seth S. Gross
AT&T
295 North Maple Avenue
Room 3244J1
Basking Ridge, NJ 07920

Roy L. Morris
Allnet Communications Services, Inc.
1990 M Street, NW
Suite 500
Washington, DC 20036

Charles H. Helein
Julia A. Waysdorf
Helein & Waysdorf, PC
1850 M Street, NW
Suite 550
Washington, DC 20036

Peter Arth, Jr.
Edward W. O'Neill
Ellen S. Levine
Attorneys for the People of the State of California...
505 Van Ness Avenue
San Francisco, CA 94102

Michael J. Shortley, III
Frontier Corporation
180 South Clinton
Rochester, NY 14646

Andrew D. Lipman
Dana Frix
Swidler & Berlin, Chtd.
3000 K Street, NW
Suite 300
Washington, DC 20007

Grant Wood
State of Arizona
1275 West Washington
Phoenix, AZ 85007

Winston Bryant
State of Arkansas
200 Tower Building
323 Center Street
Little Rock, AR 72201

State of California
1515 K Street
Suite 511
P.O. Box 944255
Sacramento, CA 94244

Genevieve Morelli
CompTel
1140 Connecticut Avenue, NW
Suite 220
Washington, DC 20036

Danny E. Adams
Steven A. Augustino
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Richard Blumenthal
State of Connecticut
55 Elm Street
Seventh Floor
Hartford, CT 06106

Ken McEldowney
Consumer Action
116 New Montgomery
San Francisco, CA 94105

Robert A. Butterworth
State of Florida
The Capitol
Tallahassee, FL 32399

Kathy L. Shobert
General Communications, Inc.
901-15th Street, NW
Suite 900
Washington, DC 20005

David J. Guidino
GTE
1850 M Street, NW
Suite 1200
Washington, DC 20036

James E. Ryan
State of Illinois
500 S. Second Street
Springfield, IL 62706

Pamela Carter
State of Indiana
219 State House
Indianapolis, IN 46204

Thomas J. Miller
State of Iowa
Hoover Building
Second Floor
Des Moines, IA 50319

Carla J. Stovall
State of Kansas
Kansas Judicial Center
Second Floor
Topeka, KS 66612

Catherine R. Sloan
Blaine C. Giles
LDDS Communications, Inc.
1825 Eye Street, NW
Suite 400
Washington, DC 20006

Randall B. Lowe
Piper & Marbury
1200-19th Street, NW
Washington, DC 20036

William Malone
9117 Vendome Drive
Bethesda, MD 20617

J. Joseph Curran, Jr.
State of Maryland
200 St. Paul Place
Baltimore, MD 21202

Scott Harshberger
Commonwealth of Massachusetts
One Ashburton Place
Room 2010
Boston, MA 02108

Gregory Intoccia
Donald J. Elardo
MCI
1801 Pennsylvania Avenue, NW
Washington, DC 20005

Charles C. Hunter
Hunter & Mow, PC
1620 Eye Street, NW
Suite 701
Washington, DC 20006

Hubert H. Humphrey, III
State of Minnesota
102 State Capitol
St. Paul, MN 55155

Douglas M. Omman
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102

Allan G. Mueller
Missouri PSC
P.O. Box 360
Jefferson City, MO 65102

Martha S. Hogerty
Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Chairperson
Telecommunications Subcommittee Consumer Protection
Committee
National Association of Attorneys General
444 Capitol Street
Washington, DC 20006

Frankie Sue Del Papa
State of Nevada
Capitol Complex
Carson City, NV 89710

Edward R. Wholl
William J. Balcerski
NYNEX
120 Bloomingdale Road
White Plains, NY 10605

Betty Montgomery
State of Ohio
30 East Broad Street
17th Floor
Columbus, OH 43266

James P. Tuthill
Betsy Stover Granger
Pacific Bell/Nevada Bell
140 New Montgomery Street
Room 1525
San Francisco, CA 94105

Ernest D. Preate, Jr.
Commonwealth of Pennsylvania
Strawberry Square
16th Floor
Harrisburg, PA 17120

Jeffrey B. Pine
State of Rhode Island
72 Pine Street
Providence, RI 02903

Robert M. Lynch
Durward D. Dupre
J. Paul Walters, Jr.
Southwestern Bell
One Bell Center - Suite 3520
St. Louis, MO 63101

Leon M. Kestenbaum
H. Richard Juhnke
Sprint
1850 M Street, NW
11th Floor
Washington, DC 20036

William Terry Miller
Telecommunications Company of the Americas, Inc.
901 Rosenberg
Galveston, TX 77550

Charles W. Burson
State of Tennessee
500 Charlotte Avenue
Nashville, TN 37243

Jeffrey Amestoy
State of Vermont
109 State Street
Montpelier, VT 05809

Darrell V. McGraw, Jr.
State of West Virginia
State Capitol
Room 28 - East Wing
Charleston, WV 25305

Suellen Lambert Young
Alabama PSC
P.O. Box 991
Montgomery, AL 36101

Larry A. Peck
Michael J. Karson
Ameritech
2000 W. Ameritech Center Drive
Hoffman Estates, IL 60196

Grant Wood
State of Arizona
1275 West Washington
Phoenix, AZ 85007

Edward D. Young, III
Michael E. Glover
Bell Atlantic
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

M. Robert Sutherland
Richard M. Sbaratta
Helen A. Shockey
BellSouth
4300 Southern Bell Center
675 West Peachtree Street, NE
Atlanta, GA 30375

Phyllis A. Whitten
Michael C. Wu
Swidler & Berlin
3000 K Street, NW
Suite 300
Washington, DC 20007

Pamela Carter
State of Indiana
219 State House
Indianapolis, IN 48204

Thomas J. Miller
State of Iowa
Hoover Building
Second Floor
Des Moines, IA 50319

Stuart N. Dolgin
17 Battery Place
Suite 1200
New York, NY 10004

Paul Rodgers
Charles D. Gray
James Bradford Ramsey
NARUC
1102 ICC Building - P.O. Box 684
Washington, DC 20044

William J. Cowan
Mary E. Burgess
NYDPS
Three Empire State Plaza
Albany, NY 12223

Gregory M. Casey
Oncor Communications, Inc.
6707 Democracy Blvd.
Bethesda, MD 20817

Maureen A. Scott
Veronica A. Smith
John F. Povilaitis
The Pennsylvania PUC
P.O. Box 1365
Harrisburg, PA 17021

Jeffrey B. Pine
State of Rhode Island
72 Pine Street
Providence, RI 02903

John H. Carley
State of New York
Department of Law
120 Broadway
New York, NY 10271

James E. Doyle
David J. Giles
State of Wisconsin
123 West Washington Avenue
P.O. Box 7856
Madison, WI 53707

Cynthia B. Miller
Florida PSC
101 East Gaines Street
Tallahassee, FL 32399

T.A. Sonneborn
Consumer Protection Division
P.O. Box 30213
Lansing, MI 48909

Rowland L. Curry
PUC of Texas
7800 Shoal Creek Blvd.
Austin, TX 78757

Douglas M. Ommen
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102

David A. Gross
AirTouch Communications, Inc.
1818 N Street, NW
Suite 800
Washington, DC 20036

ITS
1231-20th Street, NW
Washington, DC 20036